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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL PAUL CRUZ, Defendant and Appellant.	G036884 (Super. Ct. No. 03SF0450) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Dennis P. O'Connell for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting, Felicity Senoski and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Daniel Paul Cruz was convicted of first degree burglary (count 1; Pen. Code, §§ 459, 460, subd. (a); all further statutory references are to this code unless otherwise specified) and two counts of first degree robbery while acting in concert with two or more others (counts 2 and 3; §§ 211, 212.5, subd. (a), 213, subd. (a)(1)(A)). The jury found true that he was vicariously armed (§ 12022, subd. (a)(1)); the court found true a prior strike conviction (§§ 667, subds. (a)(1), (d) & (e), 1170.12, subd. (b)) and a prior prison term allegation (§ 667.5, subd. (b)).

Defendant was sentenced to 23 years in prison. On count 2, the principal count, he received 12 years, which is double the midterm, and on count 3, four years, which is one-third the midterm, doubled. Sentence on count 1 was stayed under section 654. On the firearm enhancement for count 1, he received one year, stayed; for the firearm enhancement for count 2, a consecutive one-year term was imposed; and a one-year term for the count 3 firearm enhancement was stricken. For the prior conviction, he received a consecutive five-year term under section 667, subdividsion (a)(1) and a one-year consecutive term under section 667.5, subdivision (b).

On appeal, defendant claims the evidence is insufficient. He also argues the court erred in denying a motion to exclude a witness's identification of his car, admitting a statement made before he received a *Miranda* warning (*Miranda* v. *Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), and refusing to give a jury instruction that the prosecution had not timely disclosed evidence. He additionally maintains his counsel was ineffective for failing to challenge a seated juror. Finding none of these claims meritorious, we affirm.

FACTS

At about 6:15 a.m. near the restaurant in which he was employed, Joan Gomez saw two cars, a Toyota and a tan or cream colored Explorer. In the Toyota, he

observed a man wearing gloves wiping a gun. He also saw four or five Hispanic men get out of the cars and walk to a nearby gas station; one of the men wore a blue baseball cap. Gomez called 911. When the men left the gas station's convenience store, some left in the Toyota and others in the Explorer.

A few minutes later, Christine McGovern saw a tan or gold Explorer stop in front of the house across the street from hers. Two men got out and walked toward a neighbor's house; the Explorer drove away. At about 6:20 McGovern called the neighbor, Randall Shaffer, to warn him. At 6:28 she called 911.

The two men entered Shaffer's house, robbed him and his girlfriend at gunpoint and left. Shaffer then went to McGovern's house and reported the robbery to the 911 operator she had called. A few houses down the street from Shaffer's, Jeremy Conrad saw two Hispanic men running; one of them said, "He'll pick us up somewhere around here."

After hearing a broadcast that several men with guns in a cream-colored Explorer had been seen in the area, at 6:25 sheriff deputies Daniel Missel and Nick Wray stopped a tan or gold Explorer. Defendant, wearing a sweatshirt and blue baseball cap, was the driver. There were no passengers.

The deputies took McGovern to the site where defendant had been detained and asked her if she recognized the Explorer. She was "absolutely" positive that it was the car she had seen drop off the men at her neighbor's street.

Additional facts are set out below.

DISCUSSION

1. Ineffective Assistance of Counsel

Defendant claims that his lawyer's failure to challenge a seated juror for cause constituted ineffective assistance of counsel. We disagree.

a. Procedural Background

After opening statement the juror sent a note to the bailiff, which stated: "I have heard that the defendant lives in Anaheim. I also live in Anaheim. I might have friends that know him or he might be a neighbor that I've never seen. Is it possible to be excused due to this fact? . . . [¶] It may hinder my vote." Defendant and counsel for both sides met with the juror and the judge, who questioned the juror. The judge asked for the basis for the juror's belief that he had "any connection" to defendant. The juror replied, "Well, my brothers also grew up – well, they hang out in Anaheim. And I just think that, not talking to anybody, the conversation might come up. So it's just a thought that came to my mind." The juror said he "definitely" intended to follow the order not to discuss the case until it was completed. He also confirmed he had never met defendant. The juror agreed with the judge that given the size of Anaheim and defendant's common surname, it was unlikely any of his friends knew defendant, but said, "it's a small world[, s]o who knows?" He also agreed he was "always impartial," but "it might hinder my vote."

The juror was unable to articulate what would hinder his vote. He was contradictory about whether defendant living in Anaheim would make a difference, but said he would decide based on the evidence. The court asked: "Am I correct in saying if you're saying, 'it might hinder my vote,' it might hinder your vote to the not guilty side rather than the guilty side?" The juror replied, "I would have to go based on the evidence." When the court asked whether he felt threatened because he might vote guilty, the juror stated, "Not that I can conceivably vote guilty. I might run across him again. I don't know. [¶] The court: Does that create some fear? [¶] [J]uror: . . . It might. It does in a way. [¶] . . . [¶] . . . I do have a family. And I just don't want to put myself in that situation. And that's why I'm saying that it might hurt my vote."

The court then asked both counsel if they wished to question the juror. Defendant's lawyer did not. The prosecution's few questions elicited the same answers

the juror had to the court's questions. The court refused to excuse the juror, noting that the request could be addressed later if necessary.

The issue came up again after the court had admonished six of defendant's family members for inappropriately laughing during a prosecution witness's testimony. The court stated it had not made a final decision as to the juror's request. It noted that the family members had been in the courtroom since the beginning of the trial that morning and the juror was mentioning some fear. He again asked counsel if either was requesting the juror be removed and both said they were not.

Defendant's lawyer posited that, based on the number of family members present and the fact that the defendant lived in Anaheim, the juror could be speculating that defendant was a gang member and fear retaliation, although there had been no mention of gangs. He suggested that the court advise the jurors it was not a gang case because other jurors might have the same belief. The court agreed that "if [the juror] feels intimidated, there may be gang connotations . . . . But we would be drawing that conclusion not based on anything that was specifically said by [the juror]." The judge stated he believed the juror "may be intimidated" but did not know if there was a basis for it.

Before closing arguments, the court brought up the issue again. Both lawyers declined to seek dismissal. Defendant's lawyer specifically waived any claim of error for failure to excuse the juror. He stated that the court had made clear to the juror that if he felt any additional discomfort he could renew his request to be excused and the juror had not done so.

Defendant claims that, based on the court's finding the juror was intimidated, a reasonably competent lawyer would have asked to have the juror excused because the juror was biased against him.

b. No Ineffective Assistance

To prevail on an ineffective assistance of counsel claim, a defendant must show that, viewed objectively, counsel's performance fell below prevailing professional standards and was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) On appeal, we "'defer to counsel's reasonable tactical decisions'" and do "'not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Contrary to defendant's claim, the court never made a finding the juror was intimidated, merely that he might be. Therefore counsel did not waive defendant's right to an impartial jury. But even assuming the juror was intimidated, there is nothing to show that would lead him to vote to convict. Rather, common sense tells us he would vote to acquit, a favorable result for defendant.

Second, the record reveals counsel's reason for not seeking the juror's dismissal. Although the juror's initial request to be excused had been denied, the court had made clear he could renew it if he continued to feel uncomfortable. But he had not done so. Defendant's lawyer noted this on the record, commenting that the juror "could not point to anything in open court, except that somehow in the future maybe, maybe he might have some relatives who may know the family[; thus] there were no grounds to dismiss him. [The juror] had just expressed some tangent, something off in the future. And I thought this court was pretty clear with him that you were open[] to anything further if it came up, to [be] immediately . . . notified. In the absence of that, I don't see any cause." Thus, counsel believed there was no basis for dismissal.

This was reasonable conduct on counsel's part, defeating a claim of ineffective assistance.

2. Miranda Claim

There was testimony that, at the time he was booked but before he was given his *Miranda* warning, defendant gave an officer his address, including that he lived in Anaheim. Defendant maintains the prosecution stipulated it would not offer defendant's non-*Mirandized* statements in the case-in-chief. He claims admission of his address was prejudicial because it created an inference he was in San Clemente only to commit the crime. He also asserts this increased the juror's fear about defendant. We are not persuaded.

First, there was no stipulation that this statement would not be offered. During argument on pretrial motions, the prosecution stipulated that two statements made while defendant was in custody but before his *Miranda* warning would not be offered unless in rebuttal if defendant testified. Defendant had given a contradictory explanation of why he was in the area of the crime and had also denied being in the convenience store contrary to a receipt and surveillance camera footage. There was no discussion of his statement to the booking officer.

Second, defense counsel did not object to the testimony as to defendant's residence. Thus, it is waived. (Evid. Code, § 353; *People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13 [challenge to confession on ground it was involuntary waived on appeal because not raised at trial].)

Even on the merits, however, the argument fails. In *Pennsylvania v. Muniz* (1990) 496 U.S. 582 [110 S.Ct. 2638, 110 L.Ed.2d 528], the court set out "a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the '"biographical data necessary to complete booking or pretrial services."'" (*Id*. at p. 601 (plur. opn. of Brennan, J.).) In that case the challenged information included the defendant's address. The court did note that questions asked during booking are not necessarily exempt from *Miranda*. "'[T]he police may not ask questions, even during booking, that are designed to elicit incriminatory admissions.'" (*Id*. at p. 602, fn. 14,

(plur. opn. of Brennan, J.).) Here there is no evidence the officer's question about defendant's address was for the purpose of obtaining incriminatory evidence.

3. Identification Admonition

Defendant contends McGovern's identification of his car is tainted because she was not given an "advisement" pursuant to *Simmons v. United States* (1968) 390 U.S. 377 [88 S.Ct. 967, 19 L.Ed.2d 1247]. In defendant's pretrial motion to exclude the identification he argued that the locale of identification was overly suggestive because it was close to the location of the robbery and there was a handcuffed Hispanic male near the vehicle. He claimed the admonishment given "for a single suspect lineup also would apply to a single car lineup."

The court conducted an Evidence Code section 402 examination of McGovern. She testified that after the robbery, a deputy said "they had a vehicle stopped around the corner and that he wanted me to take a look at it to see if I recognized it." That one deputy was with her when she identified the Explorer. He asked her if it was the car she had seen dropping off the two men. She looked at only the side and the back of the car. Several people were standing near the vehicle; she did not recall seeing anyone in handcuffs.

The court denied the motion because McGovern "testified unequivocally" she had not seen anyone handcuffed. In addition it ruled no admonishment was required when a witness is asked to identify an object.

In *Simmons* the defendant claimed a pretrial photographic lineup, from which several witnesses identified him, violated due process because it was overly suggestive and promoted misidentification. The court rejected the argument, holding that due process is not violated unless the identification process is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States*, *supra*, 390 U.S. at p. 384; see also *People v. Yeoman* (2003)

31 Cal.4th 93, 123.) Defendant bears the burden to show the identification procedure violated his due process. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051.)

Defendant fails to set out the language of the admonition he claims should have been given. Presumably he is suggesting something similar to that told to witnesses before they look at a showup or lineup, to the effect that the car McGovern would see was not necessarily the one used in the crime and just because she was being asked to view the car did not mean she had to identify it as the one she had seen.

This argument has several flaws. First, nothing in *Simmons* requires that an admonition be given in any event, and defendant cites no cases supporting that claim. Rather, an admonition is a tool to help assure the reliability of an identification. Moreover, defendant fails to supply any authority that the rules of *Simmons* apply to a vehicle or other object as opposed to identification of a suspect.

Even assuming *Simmons* does apply to things, defendant's argument fails. An identification violates due process only if the procedure was overly suggestive and unnecessary and under the totality of the circumstances the identification was unreliable. (*People v. Carter* (2005) 36 Cal.4th 1114, 1162.) Here, the court found the circumstances were not overly suggestive and the record supports that finding. It relied on McGovern's testimony she saw no one in handcuffs near the car. We must accept this finding of fact. (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.)

The presence of several police cars in the area of the car was not overly suggestive. McGovern knew a crime had been committed; she was a witness and had called 911. She would expect police to be present. That was not a suggestion the detained car was the one she had seen. There was no evidence the deputy told her he believed this was the correct car or pressured her to identify it. Nor does the record contain any other facts supporting defendant's claim.

In addition, nothing required her to view more than one car. Even single-person identifications are not inherently unreliable. "A prompt on-the-scene

confrontation between a suspect and a witness enables the police to exclude from consideration innocent persons so a search for the real perpetrator can continue while it is reasonably likely he is still in the immediate area. [Citation.]" (*People v. Cowger* (1988) 202 Cal.App.3d 1066, 1071-1072.)

Defendant did not meet his burden to show the identification procedure was unduly suggestive. Thus, we need not decide "'whether the identification was nevertheless reliable under the totality of the circumstances.' [Citations.]" (*People v. Carter, supra,* 36 Cal.4th at p. 1164.)

4. Sufficiency of the Evidence

Defendant asserts the evidence was insufficient to support the conviction because defendant was never identified in court and the evidence was primarily circumstantial. We are not persuaded.

"'In assessing a sufficiency-of-evidence argument on appeal, we review the entire record in the light most favorable to the prevailing party to determine whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] The same standard applies to a conviction based primarily on circumstantial evidence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745; see also *People v. Holt* (1997) 15 Cal.4th 619, 667, 668.)

An Explorer was seen dropping off the two men who robbed Shaffer's home. Within minutes defendant was detained in the immediate vicinity of the robbery driving a gold Explorer without any passengers. Immediately after the robbers left the home, one was heard to say a driver would pick them up somewhere nearby. When detained, defendant was wearing a blue baseball cap. A man wearing a blue baseball cap was seen getting out of an Explorer at the nearby restaurant a few minutes before the

robbery. One of the men with him had a gun. This was sufficient evidence to sustain the convictions.

The contrary evidence defendant points to is incorrect and irrelevant. First, defendant's broad claim he was never identified in court is inaccurate. Deputy Missel who detained him, and a sheriff's investigator, Steven Hill, identified him. Second, Hill identified defendant on the videotape he received from the gas station. McGovern's inability to identify defendant as the driver of the Explorer, the lack of evidence that defendant knew the victims, and the like goes merely to the weight and credibility of the evidence, which we do not redetermine. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206-1207.)

5. CALJIC No. 2.28

Deputies Missel and Wray heard the broadcast about several men in an Explorer when they were leaving their station. At that point, they turned on a videotape machine in their police car. It recorded their departure from the station and their ultimate stop of defendant. Investigator Hill testified he reviewed the tape and made copies. In making copies he inadvertently erased the initial 30 to 45 seconds of the tape. The erased part showed another car driving near where defendant's Explorer was stopped. He could not determine the make of the other car from viewing the tape but it had a "truck-like outline." Neither the prosecution nor the defense ever had a copy of the complete tape. Hill learned the day before he testified that a portion of the tape was missing.

Defendant made a motion for sanctions, seeking dismissal, or in the alternative, that the jury be instructed with CALJIC No. 2.28, advising the jury that the prosecution had concealed or unreasonably delayed in producing evidence to defendant. Defendant claimed that although Hill knew of the erasure the day before he testified, he failed to disclose it. The court denied the motion.

Defendant claims the court erred in refusing to give the instruction. He makes the same argument as he did in the trial court and contends that the possibility there was another SUV in the area was "crucial evidence" tending to "establish his innocence." Without a record reference he asserts that one of the prosecution's main arguments was that defendant's Explorer had to be the car that dropped off the two robbers because there were no other matching SUV's in the area that morning. He also maintains that the jury should have been told that Hill did not disclose the erasure until the prosecution asked him about it. None of these arguments persuades.

The portion of CALJIC No. 2.28 on which defendant relies states: "If you find that the concealment . . . or delayed disclosure was by the prosecution, and relates to a fact of importance rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider that concealment . . . or delayed disclosure in determining the believability or weight to be given to that particular evidence." (Brackets omitted.) The instruction is based on section 1054.5, subdivision (b), which allows the court to tell the jury of late disclosure of evidence or failure to disclose.

The record does not support either of these factors. First, the prosecution did not delay in disclosing or fail to disclose. Hill's investigation report, given to the prosecution and the defense, noted what was on the erased part of the tape. Second, Hill did not realize a portion of the tape had been erased until the day before he testified. The prosecutor had no knowledge of the erasure until he was told about it by defense counsel at the time Hill was testifying. Thus, there was no concealment.

In addition, the record does not support a claim defendant was prejudiced. The information about the erasure and what was on the erased portion was explained to the jury during Hill's testimony. Defense counsel was able to thoroughly cross-examine Hill. And in light of the other evidence there is no support for the claim that the jury seeing another SUV-like vehicle on the tape would have exonerated defendant.

In the context of the defense withholding or delaying production of evidence, cases hold that the violation must be done by or at the direction of the defendant personally and that it caused prejudice. (E.g., *People v. Cabral* (2004) 121 Cal.App.4th 748, 751, 753; *People v. Bell* (2004) 118 Cal.App.4th 249, 254-255, 257 [court reversed after CALJIC No. 2.28 given because it "[invite[ed] the jury to speculate, or to punish a defendant for the malfeasance of someone else"].) In applying those principles here where the prosecution is accused of a discovery violation, neither prong is satisfied.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.